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Supreme Court of the United States.

OCTOBER TERM, 1973.

No. 73 - 809.

ANGELO ROSSI, JR., ET AL,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONERS' REPLY BRIEF TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION.

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Petitioners Angelo Rossi, Jr., Howard Silverman and William Silverman pray that this Court should defer its consideration of the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit until petitioners' appeal from the denial by the United States District Court of its motion for new trial upon newly discovered evidence is decided by the United States Court of Appeals for the Third Circuit.

Question Presented.

Whether this Court should, in its discretion, defer consideration of this petition for a writ of certiorari pending the shortly-expected United States Court of Appeals' decision on the United States District Court's denial of petitioners' motion for new trial upon newly discovered evidence?

Reasons for Deferring Consideration of the Writ.

DEFERMENT OF CONSIDERATION OF THE WRIT, WHERE THE UNITED STATES COURT OF APPEALS IS EXPECTED TO DECIDE PETITIONERS' APPEAL FROM THE UNITED STATES DISTRICT COURT'S DENIAL OF THEIR MOTION FOR NEW TRIAL UPON NEWLY DISCOVERED EVIDENCE DURING THE SPRING OF 1974, WILL ALLOW THIS COURT TO SERVE THE INTERESTS OF JUDICIAL ECONOMY BY AVOIDING CONSIDERATION OF APPEALS WHICH MAY BE BOTH PIECEMEAL AND, SHOULD THE UNITED STATES COURT OF APPEALS GRANT PETITIONERS' APPEAL, NOT YET RIPE FOR ITS REVIEW.

Petitioners, on a motion accompanying their petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit, moved this Court to defer consideration of said petition until their motion below for a new trial upon newly discovered evidence was decided (Pet. 31-32). Petitioners' motion for new trial upon newly discovered evidence was denied by the United States District Court by order dated November 14, 1973. Petitioners' appeal from said denial to the United States Court of Appeals was docketed on January 2, 1974. Consolidated Brief for Defendants was timely filed on January 31, 1974; Brief for Appellee was filed, out of time, on February 27, 1974; and the Reply Brief for Defendants was timely filed on

March 15, 1974. Oral argument has been tentatively scheduled by the United States Court of Appeals for May 30, 1974. Normally, a decision by this United States Court of Appeals is rendered within one month of the date of oral argument.

The United States has argued, in its late-filed Brief for the United States in Opposition, that this Court need not defer its decision on this petition until petitioners' appeal currently pending in the United States Court of Appeals is decided (Footnote 2, pages 6-7) and has cited *United States* v. *Frame*, 454 F. 2d 1136 (C.A. 9), cert. den., 406 U.S. 925, as authority for its argument. The chronology of *United States* v. *Frame, supra*, however, strongly suggests that this Court used its discretion to defer consideration of petitioner's petition in that case until the United States Court of Appeals below denied petitioner's appeal both from his conviction and from the United States District Court's denial of his motion for new trial upon newly discovered evidence. Thus, petitioner Frame filed his petition for a writ of certiorari (No. 71-6218) in 1971, following his conviction by the United States District Court and its affirmation, on June 2, 1971, by the United States Court of Appeals (see 444 F. 2d 71 (C.A. 1971). Prior to said affirmation, petitioner filed a motion for new trial upon newly discovered evidence, which was denied by the United States District Court on February 26, 1971, said decision being affirmed by the United States Court of Appeals on January 20, 1972 (see 454 F. 2d 1136 (C.A. 1972)). *This Court did not deny petitioner's petition for a writ of certiorari until* May 15, 1972, *or nearly five months after the United States Court of Appeals had affirmed the denial below of petitioner's motion for new trial upon newly discovered evidence* and almost one year after the United States Court of Appeals had affirmed the petitioner's conviction.

Moreover, deferment, by this Court, of consideration of petitioners' petition for a writ of certiorari until the United States Court of Appeals has decided petitioners' appeal from the denial, by the United States District Court, of its motion for new trial upon newly discovered evidence would best serve the interests of judicial economy. Should the United States Court of Appeals deny petitioners' appeal, petitioners intend to file a petition for writ of certiorari and would move, if the Court defers its consideration of the pending petition, to consolidate both petitions so as to maximize judicial economy in the consideration of this case. Should the United States Court of Appeals affirm petitioners' appeal and remand this case to the United States District Court for a new hearing or a new trial, this case would then be "not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen* v. *Bangor and Aroostook Railroad,* 389 U.S. 327, 328 (1967). Thus, under either alternative outcome of petitioners' appeal below, the best interests of efficient judicial administration dictate that this Court should defer its consideration of the current petition for writ of certiorari pending the resolution of said appeal.

Conclusion.

For the foregoing reason, this Court should defer its consideration of the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit until petitioners' appeal from the denial by the United States District Court of its motion for new trial upon newly discovered evidence is decided by the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

MORRIS M. GOLDINGS,
Attorney for Petitioners.

March 15, 1974.